

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

18 On July 15, 2008, Plaintiff and non-party Department of Fair Employment and Housing
19 (“DFEH”) appeared before Magistrate Judge Patricia V. Trumbull for hearing of Plaintiff’s motion
20 to compel DFEH to produce documents responsive to a subpoena.¹ Based on the moving, opposition
21 and reply² papers filed and arguments submitted,

¹ The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

1 IT IS HEREBY ORDERED that Plaintiff's motion to compel DFEH to produce documents³
 2 is GRANTED IN PART and DENIED IN PART for the reasons stated herein.
 3

4 **I. BACKGROUND**

5 This is an action for discrimination in housing. Plaintiff filed a complaint with the U.S.
 6 Department of Housing and Urban Development ("HUD") on November 9, 2005. HUD waived
 7 jurisdiction to DFEH and informed Plaintiff that her complaint would be processed by DFEH.⁴
 8 DFEH processed the complaint until March 21, 2006, when jurisdiction was waived to HUD and
 9 Plaintiff's complaint was "reactivated" for processing by HUD.⁵ When Plaintiff's complaint was
 10 reactivated by HUD, it appears that DFEH returned Plaintiff's case file to HUD.⁶

11 On January 9, 2007, HUD issued a Determination of No Reasonable Cause (Title VIII), and
 12 on January 16, 2007 it dismissed Plaintiff's complaint. (See Plaintiff's Reply Papers, Exh. 5.) On

13 ³ In her reply papers and at the hearing, Plaintiff also raised issues regarding the propriety
 14 of DFEH having waived jurisdiction over her complaint to HUD, and regarding the runaround and other
 15 mistreatment she says she has gotten from DFEH. Those issues are not before the court because DFEH
 16 is not a Defendant in this action. The **only** jurisdiction the court has over DFEH in this action is by
 17 virtue of the subpoena Plaintiff served on DFEH. The sufficiency of DFEH's compliance with that
 18 subpoena is thus the only issue before the court involving DFEH. The court has no jurisdiction to
 19 entertain any other complaints Plaintiff may have regarding the way DFEH has treated her.

20 ⁴ See Exhibit 5 to Plaintiff's Reply Papers at letter dated November 9, 2005 from HUD to
 21 Terman Apartments, LP.

22 ⁵ See Sheftel Decl., Exh. 3; and Plaintiff's Reply Papers, Exh. 5. In her Reply Papers, and
 23 at the hearing, Plaintiff argued that she never agreed to DFEH waiving jurisdiction back to HUD.
 24 However, according to the Worksharing Agreement, after the 100th day of an investigation, HUD
 25 assesses whether DFEH is proceeding with reasonable promptness. See Sheftel Decl., Exh. 1 at
 26 § VI.G.(1). Failure by DFEH to proceed with reasonable promptness is grounds for reactivation of a
 27 complaint by HUD. See Sheftel Decl., Exh. 1 at § V.B.(3). Well over 100 days elapsed between the
 28 date HUD waived jurisdiction to DFEH and the date DFEH waived jurisdiction back to HUD. It is not
 clear from the record whether the delay in processing was what caused Plaintiff's complaint to be
 reactivated by HUD. If so, DFEH had no choice but to return the file to HUD.

29 ⁶ DFEH's District Administrator, Susan Sheftel, has represented to the court under penalty
 30 of perjury that DFEH sent Plaintiff's file to HUD without keeping any copies. That representation is
 31 supported by the evidence showing that it is DFEH's policy to send a complainant's file to HUD when
 32 DFEH waives jurisdiction to HUD, and that DFEH waived jurisdiction over Plaintiff's complaint to
 33 "another agency" (presumably HUD) in March of 2006. See Declaration of Jaime Reyes, dated June
 34 20, 2008 at ¶ 5; and Sheftel Decl., Exh. 3. Ms. Sheftel's declaration is supported by a letter dated
 35 April 18, 2006, from HUD to G&K Management Co. advising that Plaintiff's complaint had been
 36 "reactivated" by HUD, and that DFEH's case file had been returned to HUD. See Exhibit 5 to Plaintiff's
 37 reply papers. And, in fact, Plaintiff submitted an incomplete copy of her case file from HUD with her
 38 reply papers. See Exhibit 5 to Plaintiff's reply papers.

1 January 30, 2007 HUD received a Freedom of Information Act (“FOIA”) request from Plaintiff.⁷
 2 HUD sent Plaintiff a response to her FOIA request in which it agreed to provide her with a partial
 3 copy of the case file. (See Plaintiff’s Reply Papers, Exh. 9.) In the response, HUD noted it was
 4 withholding the following documents in their entirety:

- 5 1. Memorandum from Anné Quesada to R. Faye Austin dated 12/18/06.
- 6 2. 100 Day Letter Worksheet dated 7/31/06.
- 7 3. Memorandum from Anné Quesada to Linda Creel, dated 7/5/06.
- 8 4. Investigative Plan, undated.
- 9 5. Waiting List, Rent Rolls and tenant applications for Terman Apts.
- 10 6. Title VIII Case Completion Checklist.
- 11 7. DFEH Case Diary.
- 8. DFEH Memorandum from Anita Joseph to Susan Sheftel, dated 3/31/06.
- 9. Emails from Linda Creel, Jeff Jackson and Ralph Douglass, dated 7/6/07 [sic],
 7/10/06, 8/24/06 and 8/25/06.
- 10. Draft handwritten notes.
- 11. Documents relating to the conciliation process.

12 HUD also redacted from the documents it was providing the names, addresses and telephone
 13 numbers of neutral witnesses as well as other personal information about them. (See Plaintiff’s Reply
 14 Papers, Exh. 5.)

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16 **II. ELECTRONIC DOCUMENTS AND INFORMATION**

17 Plaintiff’s motion is GRANTED to the extent DFEH has any responsive documents and/or
 18 information in electronic form that it has not already produced to Plaintiff. DFEH shall do a
 19 reasonable search⁸ for any emails, letters, memoranda, information sheets or other documents that
 20 remain on its computers. The search shall include any and all computers used by DFEH personnel
 21 who handled any part of Plaintiff’s DFEH complaint, or otherwise had communications with
 22 Plaintiff or Defendants in connection with Plaintiff’s DFEH complaint. The production shall also
 23 include a screenshot of the CMIS page related to Plaintiff.⁹ Within one week from the date of this

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25 ⁷ A FOIA request is not subpoena, and the court cannot enforce it as a subpoena. The
 proper mechanism for obtaining documents from a non-party to use in a lawsuit is a Rule 45 subpoena.

26 ⁸ It appears from Susan Sheftel’s declaration that DFEH did not conduct *any* search for
 such documents before Plaintiff filed this motion.

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28 ⁹ On July 22, 2008, DFEH filed a document in which it states that it has produced to
 Plaintiff a copy of the information in DFEH’s record keeping database regarding Plaintiff’s case. If this
 is the screenshot of the CMIS page, then DFEH need not produce it again.

1 order DFEH shall either produce to Plaintiff any responsive electronic documents it has not yet
 2 produced, or else file and serve a declaration confirming that it has searched all of the computers
 3 referenced above, and no further responsive documents were found.¹⁰

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5 **III. HARD COPY OF PLAINTIFF'S DFEH FILE.**

6 Plaintiff's motion is DENIED as to the hard copy of Plaintiff's DFEH file. As noted above,
 7 DFEH informs the court that it sent Plaintiff's case file to HUD without keeping any copies. While
 8 Ms. Sheftel may have told Plaintiff she would send Plaintiff the file, it appears from the record that
 9 any implication that DFEH still had Plaintiff's file was factually incorrect. Nor does it appear, as
 10 Plaintiff argued, that DFEH has any control over the documents in HUD's possession by virtue of
 11 the Worksharing Agreement. The court has reviewed the Worksharing Agreement and finds nothing
 12 that would give DFEH any legal right to obtain copies of Plaintiff's case file from HUD after HUD
 13 reactivated its own processing of Plaintiff's complaint. (See Sheftel Decl., Exh. 1.)

14 Because DFEH has no obligation to produce records that are not in its "possession, custody
 15 or control," there is no basis for the court to order it to produce any documents other than the
 16 electronic documents that may still be retained on its computers. *See United States v. International*
 17 *Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989).

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19 **IV. OBTAINING THE DOCUMENTS FROM HUD**

20 As discussed at the hearing, Plaintiff must subpoena HUD in order to obtain further
 21 documents from HUD for use in this lawsuit. Plaintiff stated she already had served a subpoena on
 22 HUD.

23 At the hearing the court asked counsel for DFEH, and counsel agreed, to contact HUD and
 24 communicate the following from the court: 1) a statement that the court expects HUD to retain in its
 25 possession any and all documents it has regarding Plaintiff's complaints until further order of this
 26 court or written agreement of Plaintiff otherwise, or final termination of this action; and 2) an inquiry

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 28 ¹⁰ The document DFEH filed on July 22, 2008 does not indicate any search of computer files was conducted other than the record keeping database and the case diary. Presumably documents such as letters, emails, memos, etc., would be located elsewhere.

1 regarding whether HUD has received a subpoena from Plaintiff in the past few months. Counsel
 2 further agreed that, no later than July 22, 2008, she would inform the court and Plaintiff of HUD's
 3 response. She has now done so in a response filed July 22, 2008.

4 In response to counsel's inquiry, HUD advised that it has possession of Plaintiff's complete
 5 case file. It further advised that it was not served with any subpoena by Plaintiff. It did receive a
 6 copy of the subpoena Plaintiff served on the DFEH, and while the subpoena was not directed to
 7 HUD, HUD nonetheless looked into producing responsive documents to Plaintiff by treating the
 8 subpoena as a FOIA request. In the process, HUD realized it has already responded to a FOIA
 9 request from Plaintiff, and informed her that it has already sent her copies of all documents it is
 10 allowed to disclose pursuant to its regulations.

11 The scope of records that can be obtained with a subpoena is broader than the scope of
 12 records that must be disclosed under FOIA. *See Kamakana v. City and County of Honolulu*, 447
 13 F.3d 1172, 1185 (9th Cir. 2006) (noting that documents which are exempt from disclosure under
 14 FOIA are not automatically privileged in civil discovery). Thus, Plaintiff may be able to obtain some
 15 or all of the documents withheld by HUD by serving HUD with a proper subpoena for the records it
 16 withheld in responding to her FOIA request.¹¹

17 The court notes that HUD is correct in its observations that the subpoena Plaintiff served on
 18 DFEH was not properly issued. As a party representing herself *pro per*, Plaintiff must ask the clerk's
 19 office to issue a blank subpoena. The subpoena will be signed and dated by clerk's office personnel.
 20 Plaintiff may then fill out the subpoena with all appropriate information. The date set for HUD to
 21 provide the documents should be at least a week after the date Plaintiff serves the subpoena on HUD.
 22 *See Fed.R.Civ.Pro. 45(c)(3)(A)(i).*

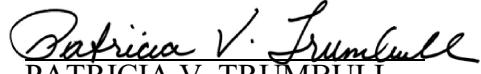
23 If, after being served with a proper subpoena, HUD then fails to respond or withholds any
 24 documents or information Plaintiff believes it should produce, then Plaintiff may file a motion to
 25 compel HUD to produce those documents. Plaintiff shall notice any such motion for hearing on this
 26 court's motion calendar (which is held Tuesdays at 10:00 a.m.), and shall serve the motion papers on

27
 28 ¹¹ A subpoena for documents that have already been produced would violate the
 requirement that a party "take reasonable steps to avoid imposing undue burden or expense on a person
 subject to the subpoena." *See FED.R.CIV.PRO. 45(c)(1).*

1 HUD at least 35 days before the noticed hearing date as required by this court's Civil Local Rule 7-2.

2 Any such motion shall also include a copy of the subpoena.

3 Dated: 7/24/08

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5 PATRICIA V. TRUMBULL
6 United States Magistrate Judge

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2 ***Counsel automatically notified of this filing via the court's Electronic Case Filing system.***

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4 copies mailed on 7/24/08 to:

5 Cathy Enwere
1263 Madera Ave.
6 Menlo Park, CA 94025

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8

/s/ Donna Kirchner for
9 CORINNE LEW
10 Courtroom Deputy

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